83-505

No.

In The Supreme Court

OF THE

United States

OCTOBER TERM, 1983

ELECTRONIC CURRENCY CORPORATION
and MELVIN E. SALVESON,
Petitioners,

vs.

WESTERN STATES BANKCARD ASSOCIATION,
BANK OF CALIFORNIA, CROCKER NATIONAL BANK,
UNITED CALIFORNIA BANK, WELLS FARGO BANK,
MASTERCARD INTERNATIONAL, INC.,
BANK OF AMERICA, and VISA USA, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I

QUESTION PRESENTED

May a federal antitrust action which alleges a continuing unlawful conspiracy properly be dismissed as barred by the statute of limitations, 15 U.S.C. § 15b, where it is shown that a new party joined the conspiracy during the limitations period, and where it is established that the new party performed acts pursuant to the conspiracy which caused damage to the plaintiffs during the limitations period?

II

PARTIES IN THE COURT OF APPEALS

The parties to the proceedings in the court below are those named in the caption of the case in this Court.

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I

OPINIONS BELOW

The memorandum opinion of the District Court granting certain defendants' motion for summary judgment is unreported and is reprinted as Appendix A to the instant petition. The memorandum disposition filed by the United States Court of Appeals for the Ninth Circuit is also unpublished and is included in the Appendix to the instant petition as Appendix B. The orders of the United States Court of Appeals for the Ninth Circuit amending its memorandum disposition and denying the petition for rehearing and suggestion for rehearing *en banc* are included in the Appendix as Appendices C and D.

III

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The decision of the United States Court of Appeals for the Ninth Circuit was entered on March 15, 1983. A timely filed petition for rehearing and suggestion for rehearing *en banc* was denied by order filed on June 24, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(c) and pursuant to Rules 17, 19, 20 and 21 of the Rules of the Supreme Court of the United States.

III

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

Federal jurisdiction in the District Court was invoked and is proper pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, and pursuant to 28 U.S.C. §§ 1331 and 1337 (a).

IV

STATUTORY PROVISION INVOLVED

15 U.S.C. § 15b provides in part that:

Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued.

V

CONCISE STATEMENT OF THE CASE

This is an action brought by the inventor of the Mastercharge system[1] pursuant to Section 4 of the Clayton Act,

[1]Petitioner Salveson created a credit card system which formed the basis of the Mastercharge System, and developed the cardholder accounting system used by Western States Bankcard Association

15 U.S.C. § 15, to recover damages suffered by reason of respondents' abuse of monopoly power in and control over the transfer and national exchange of financial information, and respondents' wilful creation and exercise of monopoly power in various credit and debit card markets. Petitioners alleged in the District Court that respondents had violated both sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.

In 1966 Wells Fargo, United California Bank, Crocker National Bank and Bank of California stole petitioners' credit card system and formed their own credit card operating company, California Bankcard Association—predecessor in name to the Western States Bankcard Association.[2] When, in 1967, petitioners complained about the theft of their system, WSBA agreed to pay Salveson's attorneys'

[DKT. 307, Exs. A, B; DKT. 288, Ex. 60, Ex. 257, pp. 7, 9, 15, 16; DKT. 287, pp. 1609-1616; DKT. 288, Ex. 277; DKT. 457, Ex. 6]. Electronic Currency Corporation [ECC] is a Nevada corporation organized by Salveson to educate and attract the participation of financial institutions in a new competitive, credit/debit card system called the Electronic Currency System [DKT. 383, Ex. 161].

[2]Respondents Western States Bankcard Association [WSBA], Interbank Card Association [Interbank] and Visa U.S.A., Inc. [Visa] are consortiums or confederations of commercial banks which operate the Mastercharge and Visa systems [DKT. 288, Ex. 247, ¶¶ 2-11, 18; DKT. 288, Ex. 277, p. 3; DKT. 289, Ex. 2, ¶¶ 3, 5, 8, 11(a), 24-29; DKT. 289, pp. 124-138]. A chief function of WSBA, Interbank and Visa has been and is to act as clearinghouses for credit card transactions and/or to supervise, facilitate and control the interchange of credit card transaction information between and among commercial banks [DKT. 289, Ex. 2, ¶¶ 8, 11(a); DKT. 288, Ex. 247, ¶¶ 3, 6, 7; DKT. 433, *Smith Aff.*, ¶¶ 3, 5, 9, Ex. A; DKT. 288, Ex. 194]. As pertinent here, respondents Wells Fargo [Wells Fargo], Bank of California [Bank Cal], Crocker National Bank [Crocker], United California Bank [UCB], and Bank of America [B of A] are member/owners of either the Mastercharge System or the Visa System, or both [DKT. 433, pp. 2-6].

fees and, on behalf of itself, its successors and assigns,[3] entered into a written contract with petitioners. Under this March, 1967 contract, petitioners released all of their claims against WSBA, and agreed that WSBA might itself use petitioners' credit card system.[4] In return, WSBA promised that it and its assigns and successors would, at any time up to and including March, 1977, grant petitioners nondiscriminatory access to the financial information interchange network[5] controlled by WSBA, and promised that it would grant petitioners the right to use the MasterCharge mark and logo. Most critically, petitioners' right to request or receive interchange access or use of the MasterCharge mark under the 1967 contract with WSBA was specifically conditioned upon petitioners first obtaining a commercial bank customer who would authorize petitioners to negotiate with WSBA on its behalf as to the terms and conditions of interchange. Petitioners obtained no such authority until 1975. [DKT. 288, Ex. 229, ¶¶ 2, 3, 4, 9].

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[3]Interbank Card Association became an assign of WSBA in 1979 [DKT. 288, Ex. 268].

[4]In July, 1967 WSBA began the marketing and operation of this system under the trade name "MasterCharge."

[5]Interchange is the process by which financial data pertinent to the use of a credit or debit card is made available to persons participating in a given card system and/or is shared on a system-to-system basis, and by which transfers of value are effected and accounted for between and among system participants and between participants in various card systems. This interchange process is entirely analogous to, and for many years was literally based upon and tied to, the process by which checks and other negotiable instruments are cleared between and among commercial banks [DKT. 299, pp. 10-11, 30-32, 37-43; DKT. 473, Ex. A, ¶ 51; DKT. 405, Exs. 1, 2].

In 1975, petitioners for the first time obtained the commercial bank negotiating authority necessary to trigger WSBA's performance under the 1967 contract, and secured firm contracts and commitments from various credit unions, savings and loan associations and banks to participate in the Electronic Currency System, a credit/debit card system created by petitioners to compete directly against various other card systems, including those operated by WSBA, Interbank and Visa. Thereafter, in June, 1975, petitioners made their first request of WSBA for the nondiscriminatory interchange access promised in the 1967 contract. WSBA admitted in the District Court that petitioners' negotiations for interchange access did not commence until July, 1975, and admitted that such negotiations were not curtailed until after August, 1976 [DKT. 67, ¶ 28; DKT. 15, ¶¶ 148, 149, 155, 190, 191].

Various of the uncontroverted facts pertinent to the 1975-1977 negotiations for interchange access, all of which appeared on the summary judgment record, are as follows:

> (a) Petitioners could not under their 1967 contract with WSBA request that WSBA and/or its assign [Interbank] deal with them or grant interchange access until and unless petitioners had first, and as a condition precedent, obtained authority to negotiate such an interchange from a bank [DKT. 288, Ex. 229, ¶ 4]. As stated by WSBA on July 28, 1975: "WSBA agreed to negotiate in good faith with Mr. Salveson and his companies with respect to interchange arrangements for banks that had granted Mr. Salveson authority to negotiate such arrangements. The Association [WSBA] agreed to that provision to permit

Mr. Salveson to secure such authorization from, and thereafter to negotiate on behalf of certain Southern California banks which then had not joined WSBA." [*Salveson Depo.*, Ex. 3618; *See also: Salveson Depo.*, Ex. 259].

(b) Petitioners first obtained the bank authority necessary to request that WSBA, and its assign Interbank, deal with them in May 1975 [DKT. 457, Ex. 31].

(c) On June 13, 1975, petitioners for the first time directed a request to WSBA that WSBA deal with petitioners under the terms of the 1967 contract. This was the first and only request that petitioners had ever made of WSBA on any subject [DKT. 372, Ex. 3617].

(d) In August, 1975, WSBA provided petitioners with explicit written confirmation of its 1967 contract and promise to deal, and thereafter entered into negotiations with petitioners for over a year respecting the specific terms and conditions to be included in the interchange agreement as requested by petitioners in June, 1975 [*Brief of Appellants*, pp. 35-36].

(e) WSBA unequivocally admitted that, as of August, 1975 petitioners had the right to negotiate interchange. WSBA further admitted that negotiations for interchange access started in July, 1975, and admitted that such negotiations continued until after August 24, 1976 [DKT. 15, ¶¶ 190, 191, 148, 149, 155]. WSBA's answer to the complaint admits that: "[interchange] negotiations terminated when petitioners failed to respond to a counter-proposal [for limited interchange access] made by WSBA in August, 1976" [C.D. DKT. 67, ¶ 28].

(f) J. Elmer, president of WSBA, testified that, prior to his retirement in 1973, there was "no occasion" to even begin to prepare a document "that would cover the conditions of interchange" with petitioners [DKT. 285, pp. 1369-1370]. Elmer also testified that WSBA would have in fact honored the 1967 agreement, but stated that no request to negotiate had been made by petitioners prior to his [1973] retirement [*Reply Brief*, pp. 4-6].

(g) In January, 1976, WSBA prepared and sent petitioners a lengthy and elaborate compendium styled "Principles Governing Proposed Interchange Between WSBA and Commercial Bank Clients of Electronic Currency Corporation," which same was thereafter thrice modified by WSBA in February, July and August, 1976, and which extensively set out the terms and conditions upon which WSBA would permit petitioners' limited interchange rights necessary to petitioners' attempts to gain entry into certain credit card markets in the Western United States.

(h) The answers to interrogatories on file in the District Court disclose that "During the negotiations of 1975 and 1976, representatives of WSBA repeatedly assured petitioners of its intent to complete a reasonable, mutually nondiscriminatory interchange agreement" [DKT. 3, p. 28, ¶ 48]. In April, 1976 WSBA publicly announced that it "intends to continue to offer ECC the opportunity to negotiate in good faith, pursuant to the 1967 agreement" [DKT. 459, Ex. 61, p. 3].

(i) At no time prior to 1975 did petitioners make any request of Interbank. Subsequent to directing their

first, 1975, request to WSBA, petitioners requested in 1975 that Interbank, as an assign of WSBA, negotiate with petitioners for interchange rights as contemplated by the March, 1967 agreement.

(j) On February 5, 1976, Interbank responded to petitioners' 1975 request and stated: "we are waiting to receive your proposed agreement concerning an interchange arrangement between Electronic Currency Corporation and [Interbank], and, further, as discussed during [our] meeting and mentioned during our earlier correspondence, we are waiting to receive some recent, specific authorization from banks or other entities, which are qualified to participate in Interbank, for you and Electronic Currency Corporation to act as their representative in negotiations regarding an interchange arrangement with Interbank Card Association" [DKT. 459, Ex. 45].

(k) In May, 1976, R. L. Kemper, a director of WSBA and Interbank, stated that "nothing happened for eight years after the 1967 agreement [with WSBA] was signed, and then [in 1975] WSBA was approached by Dr. Salveson. Since then [1975], Mr. Kemper reported, WSBA had been negotiating in good faith with respect to a possible interchange agreement between WSBA and ECC" [*Reply Brief*, p. 8].

After commencing negotiations with WSBA and Interbank in the fall of 1975; after the exchange and revision of numerous drafts of interchange agreements outlining the terms and conditions under which WSBA proposed to do business with petitioners and grant interchange access; and, after Interbank had, in 1976, for the first time refused to deal with petitioners, petitioners concluded that the negotia-

tions were being conducted so as to unreasonably restrict and delay petitioners' entry into the national and California markets for credit/debit cards. Thus, some eighteen months after interchange access negotiations were first commenced, petitioners filed the instant complaint in March, 1977, and alleged, *inter alia*, that the 1975-1976 conduct of WSBA and Interbank violated the federal antitrust laws.[6]

In September, 1980, and after securing the early termination of petitioners' ongoing discovery, WSBA, Interbank, Wells Fargo, UCB, Crocker and Bank Cal moved for summary judgment in their favor [DKT. 432].[7] These defendants did not base their motion on a contention that the Rule 56(c) record before the District Court failed to show a genuine issue of material fact on the question of violation. Rather, the representation of WSBA, *et al.* was:

> This motion is made on three grounds: (1) plaintiffs have no standing to sue under the antitrust laws; (2) plaintiffs have not been injured in their "business or property;" and (3) plaintiffs' claims are time-barred. In addition, there has been no violation of law. We do not, however, now urge that ground, for to do so would prompt plaintiffs to demand massive additional and costly discovery which is unnecessary because the case can be disposed of on the grounds urged [DKT. 433, p. 27].

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[6]Various other facts and allegations, not relating to interchange negotiations as such, but including a 1975 agreement to boycott entered into between Visa and the Credit Union National Association were placed before the District Court on the summary judgment record.

[7]Bank of America never made or joined in any motion for summary judgment, and the District Court's *sua sponte* dismissal of B of A occurred over petitioners' strong procedural and substantive objections. In April, 1980 Visa separately filed its own motion for summary judgment [DKT. 233].

On May 7, 1981, the District Court filed its memorandum opinion granting certain defendants' motions for summary judgment. The Court ignored the "standing" and "injury to business or property" contentions advanced by defendants, and found that there was no triable issue of fact involved in determining whether the claims made by petitioners were barred by the statute of limitations, 15 U.S.C. § 15b [*Appendix A*]. On March 15, 1981, the Court of Appeals affirmed. Each of the lower courts focused exclusively on different and earlier, 1966-1972, damage suffered by petitioners as a result conduct engaged in by the bank defendants; entirely ignored the fact that the WSBA/Interbank refusals to deal did not occur and could not have occurred until after June, 1975, when petitioners first directed a request for interchange access to these latter two entities; and ignored the fact that petitioners' cause of action for damages against WSBA and Interbank could not possibly have accrued prior to June, 1975.

VI

CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), this Court considered the federal antitrust limitations statute, noted that private antitrust actions "serve as a bulwark of antitrust enforcement," and as pertinent here, observed:

> In the context of a continuing conspiracy to violate the antitrust laws, such as the conspiracy in the instant case, this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those

> damages, the statute of limitations runs from the commission of the act.
>
> • • •
>
> [I]t is hornbook law, in antitrust actions as in others, that even if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable. *Id.*, 338-339.

In our case it is undisputed that the economic relationships between petitioners and their customer credit unions,[8] savings and loan associations and banks did not come into existence until early 1975. It is undisputed and admitted that the negotiations between petitioners and WSBA, and between petitioners and Interbank, did not begin until late 1975—early 1976, and it is admitted that it was these two entities—and not the bank defendants—who were both obligated and empowered to grant interchange access rights to petitioners. It is equally undisputed that WSBA never repudiated the 1967 contract. Indeed, it specifically confirmed the continuing vitality of the contract in August, 1975, and it was WSBA's 1976/1977 breach of the 1967 contract, and its 1976/1977 refusal to deal which was alleged as unlawful and as an overt act taken pursuant to an unlawful conspiracy.

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[8]For example, Hegardt of the FAA Western Credit Union testified: "Q. Did the inability of ECC or Dr. Salveson to actually arrive at the terms of interchange with WSBA and Interbank Card Association have anything to do with the decision of FAA Western to join Visa? A. Yes. Q. What was it? A. If they had arrived at a point where they could contract with us we would have signed with them, worked with ECC. Q. As opposed to Visa? A. At that time, [1976-1977] yes." [DKT. 293, p. 247; *and see:* DKT. 301, ¶ 7; DKT. 3, ¶¶ 37-42, 45, 48, 50, 60, 66, 91, 93, 94, 96; DKT. 4, ¶¶ 48, 49, 50, 51, 63, 65, 73].

It is equally undisputed and admitted that Interbank had simply never heard of petitioners, or petitioners' 1967 contract with WSBA, until 1975.[9] Since petitioners were entirely unknown to Interbank until 1975, it can hardly be said that Interbank "finally, clearly and unequivocally" conspired to exclude petitioners from the market at some earlier point in time.[10]

The facts upon which petitioners' claim in the District Court is based clearly do not involve a "single, irrevocable and permanent injury" which was fully and legally ascertainable prior to 1973. Rather, like the facts before this Court in *Zenith, supra*, the record before the District Court clearly disclosed the existence of new, 1975-1977, economic relationships and customer and service markets; new parties to the unlawful conspiracy, and new 1975-1976 conspiratorial acts causing damage to petitioners within the four year limitations period established by 15 U.S.C. 15b. Even more specifically, it is entirely undisputed that neither the request for interchange access nor the refusal to provide interchange access occurred, or could have occurred, earlier than June, 1975—a point in time well within the four year statute. The lower courts' rulings to

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[9]It was WSBA, who, in April, 1975, first informed Interbank regarding petitioners' interchange rights and who, at the same time, secretly requested that Interbank refuse to deal with petitioners.

[10]Even assuming that 1976 Interbank's refusal was not a breach of the agreement of March 29, 1967, and assuming that its refusal to deal was entirely unilateral, that refusal was, on the facts before the District Court, at least arguably unlawful. As stated by the court in *United States v. Otter Tail Power*, 331 F.Supp. 54 (1971) *aff'd.*, 410 U.S. 366 (1973): "The Sherman Act requires that where facilities cannot practically be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms" *Id.*, 64.

the contrary conflict with established law, and have resulted in a complete miscarriage of justice.

VII
CONCLUSION

This case involves issues—monopolization of credit/debit card markets and the unlawful fixing of cardholder interest rates—which are extremely substantial in terms of their continuing impact on the national economy. Instead of permitting the action to be heard and decided by a jury, the District Court unfairly dismissed on a procedural ground—the statute of limitations—and, in doing so, refused to apply the continuing conspiracy doctrine established by this court in *Zenith*. The lower courts' refusal to apply *Zenith* constitutes a clear departure from the accepted and usual course of judicial proceedings and is, in fact, a decision which both conflicts with and is contrary to the principles established by this Court in *Zenith*.

For these reasons petitioners respectfully request that the Court issue its writ and review the opinion of the Court of Appeals, reverse the serious error there committed, and restore petitioners' right to take their case to a jury.

Respectfully submitted,

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(Appendices follow)

Appendix A

In the United States District Court
for the Northern District of California

No. C 77-2077 SW

Electronic Currency Corporation and Melvin E. Salveson,
Plaintiffs,

vs.

Western States Bankcard Association, et al.,
Defendants.

[Filed May 27, 1981]

MEMORANDUM OPINION GRANTING CERTAIN DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

On April 1, 1981, this court ruling from the bench granted motions for summary judgment brought by defendants Western States Bankcard Association, Wells Fargo Bank, Crocker National Bank, United California Bank, The Bank of California, Interbank Card Association, and Visa U.S.A., Inc. At that time the court also indicated this memorandum outlining the basis for its decision would follow.

Also, at that hearing the remaining defendant, Bank of America, National Trust and Savings Association, after discussion with the court, moved to join in the motions for summary judgment. The court indicated it would consider the motion, no further briefing was necessary, and the parties agreed to submit the motion on the record heretofore presented to the court. Accordingly, all defend-

ants are now before the court on motion for summary judgment.

These motions have generated a voluminous record (the deposition of plaintiff Melvin Salveson alone constituting some 49 volumes) and numerous court appearances. Many lengthy briefs have been directed at the complex issues of standing, of injury to plaintiffs' business and property of the statute of limitations. But since the court finds the statute of limitations issue to be dispositive, it will be the only issue discussed in this memorandum.

FACTUAL BACKGROUND

The relevant facts are not in dispute.

In about 1963, Melvin Salveson utilizing his knowledge in the fields of computer technology, finance and economics developed what he has termed a "general purpose transaction card system" which would serve individual customers, merchants and banks. He tested his system with several merchants in the Southern California market and in 1966 approached Wells Fargo Bank in an effort to sell it to that bank and two other banks. Discussions and several meetings were held and in March of 1966 Mr. Kransley, a representative of Wells Fargo asked Salveson to give him specific details of his system which he did. Shortly thereafter he was informed that Wells Fargo and the two other banks would not need his services because they were planning to develop their own credit card system "in house." Their system turned out to be remarkably similar to his own. Salveson naturally protested, claiming this was unfair and highly improper.

In the early fall of 1966, Salveson was invited to a meeting with Messrs. Buell and Elmer of Wells Fargo, Briggs of UCB, Mowry of Bank of California and Moore of Crocker. He was told that while the banks no longer needed his system, they had grown to respect him over the years and wanted him to be Executive Director in the operation of their system. He was also told that California Bank Card Association (hereinafter "CBCA") had been formed to operate it. Salveson declined the offer, told them the system was his, and left.

He contemplated suing Wells Fargo and the others for stealing his system, but believing the costs of litigation to be much more than he could muster decided to settle with them.

The agreement dated March 29, 1967, settled his claims on the alleged misappropriation of his system by CBCA. These banks which initiated the MasterCharge credit card system in California paid Salveson $112,000 in full settlement of the dispute. The actual agreement was between Salveson and his various corporate entities. It provides in pertinent part:

> 4. At any time within ten years (WSBA) will negotiate in good faith with First Parties to make an interchange agreement with First Parties on reasonable, mutually nondiscriminatory terms, for any bank or group of banks for which First Parties have or obtain authority to negotiate such agreement.

It is upon this language that plaintiff contends he had a right to defendants' assistance in entering the general purpose transaction card market.

Thereafter, in mid-summer 1967, Salveson sought to negotiate with a large data processing firm (CEIR, Inc.) which could handle all data processing needs for him but the attempt was allegedly thwarted by CBCA intervention. He also attempted to have tapes in the possession of CBCA returned to him pursuant to the terms of the March agreement. These tapes contained the computer programs for his system. CBCA commenced operations in July, 1967 but did not return the tapes until May, 1968. Salveson alleges this delay was intentional and substantially impeded his ability to market any system because he could not proceed without the tapes.

In January 1968, Salveson formally organized and incorporated ECC. He states "the purpose of the corporation was, as always had been contemplated, the marketing and operating of the system nationwide for all financial institutions. I also attempted to assign the rights I understood I had under the March, 1967 agreement to ECC."

From 1968-1971 he continued his efforts to develop further marketing and designs, and acquire computer companies to operate the system.

In 1969 Salveson approached Bank of America with an offer to do business through Electronic Currency System. The Bank of America declined.

In November and December of 1970 he wrote to Mr. Elmer of Wells Fargo and asked his bank to serve as the interchange bank called for under the March, 1967 agreement. Elmer rejected the proposal, stating: "We are fearful that our participation in this system might be construed as a conflict of interest and evidence of bad faith toward

the other member banks that joined us in forming these organizations."

In either March or April of 1971 United California Bank allegedly stated it would revoke its loan to a computer company Salveson was negotiating with if the company continued to negotiate with him.

In 1972 Salveson again asked the Wells Fargo and the Bank of America to serve as the interchange bank necessary for his system operation. He was turned down.

In 1973 Salveson turned his efforts toward developing a system with savings and loan institutions. His proposals met with a favorable response.

In 1974 Salveson sought an interchange bank to help implement a savings and loan institution program. By that time he believed "it to be futile to approach the major banks," and began to direct his efforts to independent banks.

In 1975 and through August 1976 Salveson approached the defendants and again asked them to negotiate for the interchange. Their refusals took various forms but essentially they hold him he would be welcomed into their system like any other member upon application. He rejected this approach.

This suit was filed in March of 1977 and amended in the spring of 1978 after the case was transferred from the Central District. The complaint as it now stands alleges some seventeen different violations of the antitrust laws. In outline form the alleged violations are (1) illegal price fixing of interest rates and credit card charges; (2) illegal tying arrangements of overdraft checking to credit cards and one card to another; (3) refusal to deal with plaintiff,

and (4) conspiracy and attempt to monopolize. Essentially plaintiff is alleging that the first two of the alleged violations were the defendants *goals* and the latter two violations were the *means* by which those goals could be implemented. Basically plaintiff claims the defendants got together in the late 60s and decided they were going to control the general purpose transactional card market, which would give them the power to control interest rates and card membership. Plaintiff's theory seems to be that in order to carry out this plan or monopoly it was necessary to exclude any competitor non-bank financial institutions from the credit card business, including plaintiff. For the purposes of this motion the court accepts plaintiff's allegations of a conspiracy to exclude him from the credit card market.

BANK OF AMERICA, NATIONAL TRUST AND SAVINGS ASSOCIATION AND VISA AS SUCCESSOR IN LIABILITY

Defendant Visa was not in existence in the late 60s. Its alleged predecessor in interest, Bank of America, (later NBI) had developed its own credit card system under the name BankAmericard. It differed from Interbank's (WSBA) structurally in that it was operated by Bank of America, rather than a nonprofit membership corporation. As it grew, BankAmericard had structural difficulties which eventually caused it to surrender control of the system to Visa and enter into a license agreement to allow NBI to use and allow its members to use the BankAmericard name and service mark. This transformation took place in May of 1970 when National BankAmericard,

Inc. (NBI) was formed as a Delaware non-stock membership corporation.

Plaintiff includes Visa in the instant case on the theory that a conspiracy was formed in 1966 between Bank of America and some of the MasterCharge defendants; and that Visa joined that conspiracy when it was formed in 1970. Although the court questions this allegation it will for the purposes of this motion consider the allegations in the light most favorable to plaintiff and accept it as true.

The court also accepts as true plaintiff's allegation that sometime in June of 1966, a Mr. Buell of Wells Fargo told him that "our correspondent has talked to Bank of America, and they said that if we go ahead there would be no price war. With that, top management has decided that we're probably going to be able to do this." This, plaintiff claims, is an indication the banks were conspiring as early as 1966 to control and monopolize rates, access and the marketplace; specifically that there was a conspiracy between Visa and MasterCharge banks.

STATUTE OF LIMITATIONS

Accepting the conspiracy premise, the question in applying the statute of limitations becomes, when did the events giving rise to the conspiracy occur, when did they impact on plaintiff and when did he become aware of them, and the detriment they caused him.

15 U.S.C. § 15b establishes the applicable statute of limitations. "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued." Therefore plaintiff's cause of action must have arisen sometime on March 21, 1973 or thereafter. Or in the alternative, since there are allegations of a continuing conspiracy formed outside the limitations period, there must be some "overt act" of the conspirator which caused damages to the plaintiff within the limitations period.

The Ninth Circuit has stated "A civil cause of action under the [antitrust laws] arises at each time the plaintiff's interest is invaded to his damage, and the statute of limitations begins to run at that time. *Twin City Sportsservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264 (9th Cir. 1975) *cited with approval In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68 (1979).

In the latter case, similar in several aspects to the case at bar, the Ninth Circuit discussed the rule in the context of allegations of a continuing conspiracy. The court noted where plaintiff has suffered damage in prelimitation periods but alleges the damage and conspiracy was ongoing with continuing harm, the question of when a cause of action accrues becomes confused. In such circumstances,

the court said "the question is whether [the plaintiff's] injury was the consequence of multiple wrongs or a single irrevocable and permanent injury."

In deciding whether the alleged wrongs to plaintiff flowed from one injury or from a continuing series of new injuries giving rise to new causes of action, the *In re Multidistrict Vehicle Air Pollution* court provided an analysis which is helpful in the instant case. The analogy is to a disappointed patron of the theater. When plaintiff is turned away from the theater at eight o'clock because the performance is sold out, his exclusion occurs at eight, not during the performance or when it concludes at eleven o'clock.

Plaintiff asserts the rejection by the banks in 1971-72 was not a final rejection. He argues, as did plaintiff *In re Multidistrict Vehicle Air Pollution,* that he was not fully rejected until he filed this suit or at least in 1975-76 when a second round of requests were denied. Again to continue the theater example, he argues that he was not irrevocably excluded at eight o'clock but rather told to call again just before curtain time at eight-thirty; that exclusion cannot be final until eight-thirty. Plaintiff relies on *Flintkote Co. v. Lysfjord,* 246 F.2d 368 (9th Cir.) *cert. denied,* 355 U.S. 835 (1957) to argue that the refusal of the banks to deal was not final in 1972, but continued with each new refusal to create a new cause of action. Plaintiff puts great emphasis on "negotiations" of 1975-76 as forbidden overt acts of the continuing conspiracy. Plaintiff's reliance on *Flintkote* is misplaced. As the court in *Multidistrict* noted, *Flintkote* was concerned with the period of time for which damages were recoverable, not the period of time within which suit

must be brought. As such, it does not apply to the question presented here; whether plaintiff's injury was the consequence of multiple wrongs or a single, irrevocable, permanent injury.

The Fifth Circuit provides this test: "Where all the damages complained of necessarily result from a prelimitations act by defendant, no new cause of action accrues for any subsequent acts committed by defendant within the limitations period because those acts do not injure plaintiff." *Imperial Point Colonnades Condominium, Inc. v. Mangurain,* 549 F.2d 1029, 1035 (5th Cir.) *cert. denied,* 434 U.S. 859, *cited with approval Air Pollution, supra.*

Applying these standards here it is clear that any injury to plaintiff was attributable to the refusal of the banks to deal with him. Those refusals were final at the very latest in 1972. Salveson's own deposition and the depositions of those working with him indicate they believed they could no longer negotiate with any effect with the defendants and were being forced out of the marketplace at that time. He cannot claim he was unaware at that time of the alleged conspiracy or the effect of the refusal and conspiracy upon his operations. He told his associates and shareholders of the effects of the conspiracy. He calculates his damage for that time. His injury had become permanent. Defendants' reaffirmance of a prior irrevocable decision does not cause a new injury or create a new cause of action. No new forbidden overt acts were committed by defendants that caused any new injury to plaintiff after the initial rejection of his system in 1971-72.

To continue the theater analogy, plaintiff's continued attempts in 1975-76 were not invited pre-curtain calls at

the box office; rather they were "forlorn inquiries by one, all of whose previous hopes had already been dashed." Indeed, any attempt by Salveson to claim he entertained hopes for entry into the general purpose transaction card market through the assistance of the banks in 1975-76 is contradicted by his own statement that by 1974 he believed it was futile to attempt to seek an interchange agreement with the defendants. If plaintiff still had hopes in 1975-76 of getting a seat to the performance it is difficult to see what actions by defendants sustained that hope. The defendants, through words and actions, had made it clear they did not expect to do business with him. They had told him so expressly in 1971 and in 1972. Their actions in going ahead and forming their own Visa and Mastercharge systems made it equally clear they were not going to utilize his services. Any negotiations in 1975-76 were not between Salveson, as systems operator, and the banks, as potential clients, but the opposite. The defendants were again refusing his services or program and instead offering to allow him to become their client or member of their system. They were again rejecting his attempts to come to the theater, the door had been closed in 1971-72.

Accordingly, the court finds plaintiffs' cause of action barred by the statute of limitations; summary judgment must be granted in favor of all defendants. Each side to bear its own costs.

DATED: 7 MAY 1981

/s/ SPENCER WILLIAMS
United States District Judge

Appendix B

United States Court of Appeals
for the Ninth Circuit
No. 81-4544

D.C. # C-77-2077-SW

Do Not Publish

Electronic Currency Corporation and Melvin E. Salveson,
Plaintiffs-Appellants,

vs.

Western States Bankcard Association, Bank of California,
Crocker National Bank, United California Bank,
Wells Fargo Bank, Mastercard International, Inc.,
Bank of America, and Visa U.S.A., Inc.,
Defendants-Appellees.

[Filed March 15, 1983]

MEMORANDUM

Argued and Submitted December 17, 1982
Appeal from the United States District Court
for the Northern District of California
Honorable Spencer Williams, District Judge, Presiding

Before: ANDERSON and POOLE, Circuit Judges, and
SOLOMON,* District Judge.

Plaintiffs-appellants Electronic Currency Corporation ("ECC") and Melvin E. Salveson appeal the district court's grant of summary judgment against them on their antitrust claims that defendants-appellees Western States

*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

Bankcard Association, Bank of California, Crocker National Bank, United California Bank, Wells Fargo Bank, Mastercard International, Inc., Bank of America and VISA U.S.A., Inc. had illegally refused to deal. The district court ruled that the statute of limitations had run.

The issue before us is whether there was a genuine issue of triable fact as to the expiration of the limitations period, which for federal antitrust claims has a life of four years. 15 U.S.C. § 15(b). The district court found that any refusals by defendants to deal with ECC and Salveson had become final by 1972. Since the action was not filed until 1977, the court held it to be time-barred.

We review an appeal from a grant of summary judgment *de novo* to determine whether the district court was correct in finding that no genuine issues of material fact remained for trial. Having done so, we find that the district court was correct.

The record supports the district court's conclusion that the defendants' refusal to deal with Salveson and ECC was final, clear and unequivocal by 1972, and that the later refusals in 1975-76 were merely a continuation of that position. The amended complaint itself alleges that defendants "agreed to refuse and, continuously during the period 1967-68, refused to deal with plaintiffs." Salveson had several times been rejected by the defendant banks by 1972 in his bid to become the "system operator" for their credit cards. He testified that, from the start, the banks had continued their policy of refusing to allow him to get into the business. Salveson's renewed requests to negotiate in 1975-76 were not based on any new events reasonably encouraging an expectation that the bank's policies would

be reversed at that late stage, but were more on the order of "forlorn inquiries by one all of whose reasonable hopes had previously been dashed." *In re Multidistrict Vehicle Air Pollution,* 591 F.2d 68, 72 (9th Cir.), *cert. denied,* 444 U.S. 900 (1979).

Plaintiffs contend that the refusal to deal did not become final until 1975 or 1976, because only then did plaintiffs obtain the authority from a bank, the Cerritos Valley Bank, necessary for negotiations under the 1967 Agreement for interchange access. Therefore, plaintiffs argue, the 1975 and 1976 refusals were overt acts in furtherance of the conspiracy which violated the 1967 Agreement. This contention is without merit. Salveson's Amended Complaint refers to a *policy* of exclusion. The record of repeated refusals and Salveson's own testimony that he believed the banks were seeking to exclude him as early as 1970 would force home to a reasonable person in Salveson's position the knowledge that defendants would do no business with him.

Salveson also contends that the conspiracy was fraudulently concealed from him until 1975-76. It is clear that fraudulent concealment tolls a statute of limitations. *Holmberg v. Armbrecht,* 327 U.S. 392, 397 (1946). However, the limitation period begins to run when the plaintiff discovers or in the exercise of reasonable diligence should have discovered the concealment. *NLRB v. Don Burgess Construction Corp.,* 596 F.2d 378, 382 (9th Cir.), *cert. denied,* 444 U.S. 940 (1979). The record clearly indicates that a reasonable person in Salveson's position should have discovered the alleged concealment of the conspiracy.

Defendant VISA is in a somewhat different position from the other defendants charged with the alleged antitrust conspiracy. VISA contended that there was no evidence linking it to the conspiracy, particularly as VISA was not created until 1970, a number of years after the formation of the alleged conspiracy. A motion for summary judgment was filed by VISA in the district court, on the grounds that there was no genuine issue of fact linking VISA to the conspiracy. That motion was never acted upon by the district court. Instead, the district court granted the motion of all defendants for summary judgment on the grounds that the statute of limitations had run, and assumed for purposes of that motion that VISA was a member of the alleged conspiracy.

On appeal to this court, VISA filed a separate petition arguing that the summary judgment on statute of limitations grounds was proper, and alternatively, that in any event there was no evidence linking VISA to the conspiracy. We agree with the district court that the statute of limitations issue is dispositive, and therefore it is not necessary to consider whether VISA was linked to the alleged conspiracy. Whether or not VISA was a member of the conspiracy, the failure of plaintiffs to file suit before the statute of limitations period expired bars this action against VISA.[1]

The other contentions of plaintiffs are without merit.

AFFIRMED.

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[1]Since we affirm the grant of summary judgment for all defendants, VISA's motion to strike is denied as moot. Its motion for sanctions is also denied as a matter of discretion.

Appendix C

United States Court of Appeals
for the Ninth Circuit
No. 81-4544

D.C. # C-77-2077-SW

Electronic Currency Corporation and Melvin E. Salveson,
Plaintiffs-Appellants,

vs.

Western States Bankcard Association, Bank of California,
Crocker National Bank, United California Bank,
Wells Fargo Bank, Mastercard International, Inc.,
Bank of America, and Visa U.S.A., Inc.,
Defendants-Appellees.

[Filed June 3, 1983]

ORDER

Before: ANDERSON and POOLE, Circuit Judges, and SOLOMON,* District Judge.

The memorandum disposition of March 15, 1983 is amended as indicated below. The second full paragraph on page two of the published memorandum shall be deleted and replaced with the following paragraph:

> We review an appeal from a grant of summary judgment *de novo* to determine whether the district court was correct in finding that no genuine issues of material fact remained for trial and that, viewing the evidence and the inferences which may be drawn therefrom in the light most favorable to the adverse party, the movants were entitled to prevail as a matter of law. Having done so, we find that the district court was correct.

*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

Appendix D

United States Court of Appeals
for the Ninth Circuit
No. 81-4544

D.C. # C-77-2077-SW

Electronic Currency Corporation and Melvin E. Salveson,
Plaintiffs-Appellants,

vs.

Western States Bankcard Association, Bank of California,
Crocker National Bank, United California Bank,
Wells Fargo Bank, Mastercard International, Inc.,
Bank of America, and Visa U.S.A., Inc.,
Defendants-Appellees.

[Filed June 24, 1983]

ORDER

Before: ANDERSON and POOLE, Circuit Judges, and SOLOMON,* District Judge.

The panel as constituted in the above case has now voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc hearing and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.